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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.



LUTHER H. FELTON AND E. FENWICK STONE, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 21, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 274.

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INDEX.

	Original.	Print.
Writ of error	1	1
Return of circuit court thereon	2	1
Transcript of record	3	1
Declaration	3	2
Answer	7	3
Verdict	8	3
Bill of exceptions	9	3
Clerk's certificate	16	5
Copy bond to party	17	6

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The United States of America, plaintiffs, and Luther H. Felton and E. Fenwick Stone, defendants, in an action of tort, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by

G. F. SHEPLEY,
U. S. Circuit Judge, First Judicial Circuit.

Service of this writ and citation thereunder acknowledged by defendants in error.

GEORGE P. SANGER,
U. S. Att'y.

2 Circuit court of the United States, district of Massachusetts, ss:

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this eighth day of October, A. D. 1875.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA,
Massachusetts District, ss:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday the fifteenth day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Before the honorable George F. Shepley, circuit judge.

THE UNITED STATES OF AMERICA, PLAINTIFFS, v. LUTHER H. FELTON, OF NEWTON, AND E. Fenwick Stone, of Revere, in the district of Massachusetts, defendants. } In an action of tort.

4 And the plaintiffs say that the defendants heretofore, to wit, on the twenty-first day of June, in the year of our Lord eighteen hundred and seventy-two, at Boston, in said district of Massachusetts, were distillers, and did then and there have and maintain a distillery, and did, on said twenty-first day of June, distil in said distillery a large quantity of distilled spirits, to wit, one thousand gallons thereof; and the plaintiffs say that the said defendants, on said twenty-first day of June, did knowingly and wilfully omit, neglect, and refuse to do, and cause to be done, certain of the things required by law, in the carrying on and conducting of their business as distillers as aforesaid, to wit, did knowingly and wilfully omit, neglect, and refuse to construct and maintain the pipes and other apparatus connecting the receiving cisterns in said distillery with the outlet of the worm and condenser in such manner as to prevent the abstraction of spirits while passing from the outlet of the worm and conducter back to the still and doubler; contrary to the form of the statute in such case made and provided, whereby and by force of the statute in such case made and
5 provided, said defendants have forfeited to and become liable to pay to the United States, the sum of one thousand dollars, and an action has accrued to the United States to have and recover of said defendants said sum of one thousand dollars, yet the said defendants, though often requested, have not paid the same.

And the plaintiffs say that the said defendants heretofore, to wit, on the twenty-first day of June, in the year of our Lord eighteen hundred and seventy-two, at Boston, in said district of Massachusetts, were distillers, and did then and there have and maintain a distillery, and did, on said twenty-first day of June distil in said distillery a large quantity of distilled spirits, to wit, one thousand gallons thereof; and the plaintiffs say that the said defendants on said twenty-first day of June did knowingly and wilfully do certain things prohibited by an act of the Congress of the United States of America, entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes," approved July twentieth, in the year of our Lord eighteen hundred and sixty-
6 eight, to wit, did knowingly and wilfully abstract a large quantity, to wit, five hundred gallons of distilled spirits, while passing from the outlet of the worm and condenser back to the still, contrary to the form of the statute in such case made and provided. Whereby and by force of the statute in such case made and provided, said defendants have forfeited to and become liable to pay to the United States the sum of one thousand dollars, and an action has accrued to the United States to have and recover of said defendants said sum of one thousand dollars, yet the said defendants, though often requested, have not paid the same: to the damage of the said United States, as they say, the sum of fifteen hundred dollars.

The writ in this cause is dated the twenty-eighth day of September, A. D. 1872, and was entered at the October term of the court, A. D. 1872, when and where the parties appeared by their respective attor-

neys, and thence the cause was continued from term to term to
7 this present term, when on the fifth day of January, A. D. 1875, the following answer is filed, namely:

Answer.

The defendants came and for answer say they are not guilty in manner and form as alleged against them.

They further deny each and every allegation of the plaintiffs declaration.

By BEN'J DEAN,
Their Att'y.

Issue being thus joined, this cause came on to be heard before the honorable Edward Fox, district judge of the United States for the district of Maine, specially assigned by the honorable George F. Shepley, circuit judge, to hold this circuit court, and after a full hearing this cause is committed to a jury sworn according to law to try the issue, who after hearing all matters and things concerning the same, return their verdict therein, and upon oath say:

8 The jury find for the plaintiffs and assess damages in the sum of one thousand dollars, but find by the evidence that it was only a technical violation of the law and, that there was clearly no intention to defraud the government thereby.

JACOB S. HASKELL,
Foreman.

And after verdict, to wit, January 12th, 1875, come the said plaintiffs, by their attorney, and at the suggestion of the court, and with the consent of the defendants, withdraw the second count in the declaration in their said writ.

GEORGE P. SANGER,
U. S. Attorney.

It is thereupon, to wit, May 14th, 1875, considered by the court that the United States of America, plaintiff, recover of Luther H. Felton, of Newton, and E. Fenwick Stone, of Revere, in our district of Massachusetts, gentlemen, defendants, the sum of one thousand and twenty-one dollars and sixteen cents, damages, and their costs of suit, taxed at .

9 A true record.
Attest:

JOHN G. STETSON, *Clerk.*

Upon the trial of said cause, after the evidence was closed, the defendants filed their bill of exceptions, which being found to be conformable to the facts, was allowed and ordered to be filed as of January 7th, 1875, before the jury left the bar, and is as follows, namely:

Defendants' bill of exceptions.

United States circuit court, district of Massachusetts, October T., 1874.

UNITED STATES
v.
LUTHER H. FELTON ET AL.

This cause came on for trial on the sixth day of January, A. D. 1874.
The date of the writ is .

10 The action was brought to recover the penalty of $1,000 for an

alleged infringement of the sixteenth section of an act of Congress entitled "An act imposing taxes on distilled spirits and tobacco, and for other purposes." Which said act was approved July 20, 1868, and amended by acts approved July 10th, 1869, and June 6th, 1872.

The evidence at the trial tended to prove that the defendants were distillers, and that their still having become worn out and defective, a new one was made and placed in said distillery, and that on the eighteenth day of June, 1872, after the low wines had filled and begun to overflow from the low-wine receiver, a hole was made by withdrawing or boring out a plug from a pipe which had always been in the side of said low-wine receiver, and about nine inches from the top thereof, and about four hundred gallons of low wines were drawn therefrom and dumpted into the vat from which the material for distillation was at the time being pumpted for the purpose of redistillation.

The evidence also tended to show that the cause of said overflow was, that the new still was too large for the capacity of the low-wine re-
11 ceiver, and that the defendants and their servants were ignorant of said want of capacity of said low-wine receiver until it was too late to remedy the same, for said distillation taking place on said eighteenth day of June aforesaid, and that there was no course left but to let said low-wine receiver overflow, and permit the same to run to waste, or to catch the same and secure the benefit thereof to the government and themselves by dumping it into vats for redistillation, or by withdrawing it from the top of the cistern after it had overflowed the manhole, and that said hole was opened and said low wines drawn off in good faith for the purpose of saving the property therein for themselves and the government; and that they informed the officers of the government of the condition of affairs, as follows, namely:

The superintendent of the distillery, on the morning of the said eighteenth day of June, being apprehensive that the low-wine receiver would overflow, before he went to the distillery, called upon the
12 assessor of the district, and asked permission to draw off a portion of said low wines from the low-wine receiver and dump them into the vats for redistillation, and failing to obtain said permission, induced said assessor to telegraph to the Commissioner of Internal Revenue as follows, namely:

BOSTON, *June* 18, 1872.

To Hon. J. W. DOUGLAS,
Commissioner of Internal Revenue, Washington, D. C.:

The low-wine cistern of Felton and Stone is too small to contain the low-wine product. May they for a few days, until a new cistern can be built, direct the excess of low wines into fermenting-tubs, to be pumped from there direct into the fermenting-tubs for redistillation?

Answer paid.

To this the assessor received the following:

WASHINGTON, *June* 18, 1872.

W. R. LEE,
Assessor 3d District:

Felton and Stone cannot be permitted to run low wines into fermenting-tubs. They must build new cisterns.

J. W. DOUGLAS, *Com'r.*

The evidence tended to show that when the superintendent arrived at the distillery, after sending the assessor's dispatch and before the
13 answer thereto, he found that the low-wine cistern had overflowed and that he permitted a portion of the same to be drawn off as aforesaid.

The evidence tended to show that said low wines were worthless or next to worthless, except fer redistillation, and were not merchantable or marketable spirits, and that they contained only about twenty-five per cent. of alcohol.

The counsel for the defendants asked the presiding justice to instruct the *the* jury, as follows:

"1st. That if the acts relied upon were done without the knowledge of the defendants and were known only to *to* their superintendent and only authorized by him, the defendants were not liable; or

"2nd. That the spirits to which said 16th section applied were the spirits described in the second section of said act, or if not such spirits, they must be merchantable, marketable spirits liable to taxation, and not low wines, worthless, except for redistillation; or

"3rd. That if the inadequacy of said low-wine cistern was unknown to the defendants and their superintendent until too late to pre-
14 vent the overflow, and that then the superintendent, in the exercise of his best judgment, acting in good faith, drew off said wines and dumpted the same as aforesaid for redistillation, the defendants were not liable."

The defendants asked the court to rule that if the jury were satisfied of either or all of the above facts, they were to find for the defendants.

The presiding justice refused to give either or said instructions, but ruled the contrary thereof.

The evidence proved that in the process of distilling the product first is discharged into a try-box, and thence it is directed at the will of the distiller, according to his judgment, either to the receiving-cistern or into the low-wine receiver. The low-wine receiver is a part of the apparatus whereby the low wines were carried from the try-box back to the doubler.

The court instructed the jury that defendants must be held accountable for the acts of the superintendent of their distillery in their behalf in the management of their distil., and that if the jury found that the superintendent in so doing did violate the law, by designedly
15 opening the low-wine receiver and withdrawing the plug from the pipe, so that the spirits could be and were abstracted while passing from the outlet of the worm back to the still or doubler, they would be authorized to find a verdict against the defendants.

Other instructions were given to which no exceptions were taken.

The defendants feeling aggrieved by the refusals of the presiding justice to instruct the jury as prayed, excepts thereto, and prays that their exceptions may be allowed.

By BENJ. DEAN,
Their Att'y.

Allowed.

EDWARD FOX,
Judge.

16 UNITED STATES OF AMERICA,
Massachusetts District, ss:

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause of

the United States v. Luther H. Felton et al. in said circuit court determined.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this eighth day of October, in the year of our Lord one thousand eight hundred seventy-five, and of the Independence of the United States the one hundredth.

[SEAL.] JOHN G. STETSON,
Clerk.

17 *Bond on writ of error.*

Know all men by these presents that we, Luther H. Felton, of Newton, and E. Fenwick Stone, of Revere, in the district of Massachusetts, as principals, and Fred. L. Felton, of Newton, and J. D. Waters, of Boston, in said district, as sureties, are held and firmly bound unto the United States of America, in the full and just sum of two thousand dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated the seventeenth day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately at a circuit court of the United States, holden at Boston, within and for the district of Massachusetts, in a suit depending in said court, between the United States of America, plaintiff in an action of tort, against said Luther H. Felton and E. Fenwick Stone, defendants, judgment was rendered against the said defendants, and the said defendants having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Felton and Stone shall prosecute their said writ of error to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

LUTHER H. FELTON. [L. S.]
E. FENWICK STONE. [L. S.]
FRED. L. FELTON. [L. S.]
J. D. WATERS. [L. S.]

Signed, sealed, and delivered in presence of—

Approved:

Associate Jus. Sup. Court of the U. S.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Dist. Mass.

(Indorsement on cover:) No. 274. Luther H. Felton and E. Fenwick Stone, plaintiffs in error, *vs.* The United States. Massachusetts, C. C. U. S. Filed 21st October, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

FELTON & STONE
v.
THE UNITED STATES. } No. 274.

ERROR TO UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

BRIEF OF THE DEFENDANTS IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1877.

FELTON & STONE
v.
THE UNITED STATES. } No. 274.

ERROR TO UNITED STATES CIRCUIT COURT, DISTRICT OF MASSACHUSETTS.

BRIEF OF THE DEFENDANTS IN ERROR.

STATEMENT.

September 28, 1872, the United States sued a writ out of said circuit court against Felton & Stone, declaring that they were distillers who, on the 21st day of June, 1872, distilled a thousand gallons of spirits, willfully omitting, neglecting, and refusing to do certain things required by law in the conduct of their business, and doing other things prohibited by law, viz, in not maintaining the pipes and other apparatus connecting the receiving cistern with the outlet of the worm and condenser in such manner as to prevent the abstraction of spirits therefrom, and in knowingly and willfully abstracting 500 gallons of distilled spirits while passing from the

outlet of the condenser and worm back to the still, whereby an action accrued to recover $1,000 as a forfeiture, &c. (Record, 2.) The defendants filed a general denial. (Record, 3.)

This prosecution is based on the act approved July 20, 1868, c. 186, § 16 (15 Stats., 131), as amended by act approved April 10, 1869, c. 18 (16 Stats., 41), and act approved June 6, 1872, c. 315, § 12 (17 Stats., 239, bottom). These amendatory acts do not affect the language of the original act applicable to this case, which is this:

"The owner, agent, or superintendent of any distillery established as hereinbefore provided, shall erect in a room or building to be provided and used for that purpose, and for no other, and to be constructed in the manner to be prescribed by the Commissioner of Internal Revenue, two or more receiving cisterns, *each* to be AT LEAST *of sufficient capacity to hold all the spirits distilled during the day of twenty-four hours, into which shall be conveyed all the spirits produced in said distillery;* and each of said cisterns shall be so constructed as to leave an open space of at least three feet between the top thereof and the floor or roof above, and of not less than eighteen inches between the bottom thereof and the floor below, and shall be so situated that the officer can pass around the same, *and shall be connected with the outlet of the worm or condenser by suitable pipes or other apparatus so constructed as always to be exposed to the view of the officer*, AND SO CONNECTED AS TO PREVENT THE ABSTRACTION OF SPIRITS WHILE PASSING FROM THE OUTLET OF THE WORM OR CONDENSER BACK TO THE STILL OR DOUBLER, OR FORWARD TO THE RECEIVING CISTERN." (15 Stats., 131, § 16.)

The next section requires every pipe to be so placed

as to be examinable throughout by the officer, and to be kept painted of a color specified, to indicate its use, viz, if for conveying mash, red; low wines, blue; spirits, black; and water, white.

The penalty is claimed under the general provisions of section 96 of this act, to which the attention of the court has often been called, by which a distiller, &c., who "shall knowingly and willfully omit, neglect, or refuse to do any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act, * * * shall pay a penalty of one thousand dollars." (15 Stats., 164, § 96.)

The facts alleged to support the declaration were these: A new still had been placed in Felton & Stone's distillery; on the 18th June, 1872, after the low wines had filled and began to overflow from the low-wine receiver, a hole was made by withdrawing or boring out a plug from a pipe which had always been in the side of said low-wine receiver, and about nine inches from the top thereof, and about four hundred gallons of low wines were drawn therefrom and dumped into the vat from which the material for distillation was at the time being pumped for the purpose of redistillation. The cause of the overflow was the new still being too large for the capacity of the low-wine receiver, of which the distillers were ignorant until too late to remedy it, as to the distillation then taking place; so they were compelled either to let the low-wine receiver overflow, and the spirits to run to waste, or to catch it and dump it into the vats for redistillation. The hole mentioned was opened and the low wines drawn off in good faith for the purpose

of saving the property. The superintendent of the distillery while going to his business on the morning of June 18, 1872, apprehending an overflow, called upon the assessor of the district for permission so to draw off and dump part of the low wines. Leave was not granted, but the assessor telegraphed the Commissioner of Internal Revenue for a permit, which was refused. Between the sending of this dispatch and the receipt of the negative answer the acts complained of were done. These low wines were practically worthless except for redistillation. They were not merchantable or marketable spirits, and contained only about 25 per cent. of alcohol.

Upon this state of the evidence the respondents below requested these instructions:

"1st. That if the acts relied upon were done without the knowledge of the defendants, and were known only to their superintendent and only authorized by him, the defendants were not liable.

"2d. That the spirits to which said 16th section applied were the spirits described in the 2d section of said act; or, if not such spirits, they must be merchantable, marketable spirits, liable to taxation, and not low wines, worthless except for redistillation.

"3d. That if the inadequacy of said low-wine cistern was unknown to the defendants and their superintendent until too late to prevent the overflow, and that then the superintendent, in the exercise of his best judgment, acting in good faith, drew off said wines and dumped the same as aforesaid for redistillation, the defendants were not liable." (Record, 5.)

The court was asked to rule that if the jury were satisfied of either or all of the above facts their verdict

must be for the defendant. All these requests were refused, and the jury were instructed that the defendants must be held accountable for the acts of the superintendent in the management of the business confided to him; and if he did violate the law, by designedly opening the low-wine receiver and withdrawing the plug from the pipe, so that the spirits could be (and they were) abstracted while passing from the outlet of the worm back to the still or doubler, they would be authorized to find a verdict against the defendants. (*Ib.*) Such a verdict was found, coupled with the statement that there "was only a *technical* violation of the law and there was clearly no intention to defraud the government thereby." (Record, 3, folio 8.)

It is stated that "the low-wine receiver is a part of the apparatus whereby the low wines were carried from the try-box back to the doubler." (Record, 5, folio 14.) The defendants' new still being too large for the capacity of this receiver, what was admitted to have been done by their distillery superintendent was to bore out a plug from a pipe in the side of the receiver and draw off about four hundred gallons of low wines, which were redistilled, they being worthless for any other purpose. *This was done after permission to do it had been applied for and refused*, and pending a telegraphic application to the Commissioner of Internal Revenue for such permit. Subsequently this functionary telegraphed his refusal. The defendants below based their exceptions and appeal upon the ground that they were not responsible for this act of their superintendent, done without their express authority, even if illegal; that it was not illegal because these were low wines, and not merchantable spirits; and because the inadequacy of their cistern was not known until too late to prevent its overflow, and the course adopted was then taken in good faith, and in the exercise of the superintendent's best judgment as to what the interests of all concerned required.

The instruction given by Judge Fox was "that defendants must be held accountable for the acts of the superintendent of their distillery in their behalf, in the management of their distillery," and if, in so doing, he did violate the law "by designedly opening the low-wine receiver and withdrawing the plug from the pipe, so that the spirits could be and were abstracted while passing from the outlet of the worm back to the still or doubler, they would be *authorized* to find a verdict against the de-

fendants"—and such a verdict was rendered. (Record, 5, folios 14 and 15.)

We shall consider the case in the order indicated by the exceptions, because if the superintendent's acts could not inculpate his employers, it is of no consequence what he did; if they could, we must then inquire whether or not they were lawful, or excusable in law.

I.

Were Felton & Stone responsible in a penalty for the act of their superintendent, done in the course and scope of his general employment, and for their apparent interest (to save their property under his care), but without express order or authority to do this particular act being proved?

That they would have been civilly responsible to any individual injured by any such act is indisputable, and upon a declaration averring the act to be that of the defendants generally, even though it had been a fraud or tort; as held in Brucker *v.* Fromont (6 Term R., 659) and multitudinous cases since.

So, in liquor cases, mere proof of sale by an agent sustains an indictment against the principal. (Commonwealth *v.* Park, 1 Gray, 552; Commonwealth *v.* Nichols, 10 Met., 259.)

No good reason is perceived for any distinction, where the wrongful act creates a right of action in behalf of the government, whether the proceeding be deemed civil or criminal. It has, however, always been termed civil. In Attorney General *v.* Siddon, Bailey, B., said:

"In the first place, I consider this as being, not properly a criminal proceeding, but a civil proceeding, for the purpose of recovering that which is a debt of the Crown. It is a penal proceeding. An action to recover the amount of penalties for giving receipts upon unstamped paper is a penal proceeding. But I do not consider that as being a criminal proceeding. But whatever the nature of this proceeding is—whether penal or merely civil—this is a case in which, to my mind, the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant." (1 Cromp. & Jer., 226, 227.) All the judges expressed opinions to the same effect.

In Searle *v.* Reynolds, 7 Best & Sm., 704, it was said, per Cockburn, C.J.: "There are cases in which a master, having appointed a servant to do a particular work, may be liable to a penalty for acts done by the servant if those acts are prohibited by statute."

The directors of a gas company were found guilty on account of an act done by their superintendent. (Rex *v.* Medley, 6 Car. & P., 229); State v. Hunter (1 Head, 160).

In a libel suit, speaking of the presumption arising from publication, Lord Tenterden, C. J., observed: "But it is said that this is a different principle from that which prevails in all other criminal cases; but this does not appear to me to be so. The rule seems to me to be conformable to principle and to common sense. Surely the person who derives profit from, and who furnishes means for carrying on, the concern, and intrusts the conduct of the publication to one whom he selects and in whom he confides, may be said to publish

what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication." (Rex *v.* Gutch, Moody & Malkin, 437.)

The law required the distillers to keep their pipes and apparatus "so connected as to prevent the abstraction of spirits while passing from the outlet of the worm or condenser back to the still or doubler," &c. This required an active duty and precaution of them. To accomplish it, the same section demanded that they should build cisterns of sufficient capacity to hold "at *least*" the day's production. They seek to justify the abstraction by asserting their failure to comply with this other requirement. The prosecution, therefore, succeeds against them, because they did not obey the law in either particular.

Whether the distillers would have been liable had there been proof of their ignorance of their superintendent's act, or that they did not authorize it, is a question which does not here arise. There does not appear to have been any proof either way, as to their knowledge or ignorance. The first request, therefore, found no facts in the case to support it, and was very properly refused. The implication, from the nature of the act and the character and position of the actor, was that it was authorized. If permitted to prove the contrary, it was the defendants' duty to do so; otherwise the jury were "*authorized*" (if not bound) to find a verdict against them. (Attorney General *v.* Riddle, 2 Cromp. & Jer., 493; Rex *v.* Almon, 5 Burr., 2688 to 2690, in the several opinions per Lord Mansfield, Ashton, Willes, and Ashhurst, JJ.)

II.

As to the second instruction, it suffices to say that, whatever the value of the low wines, and for whatever purposes valuable, they are the precise fluid indicated as passing from the outlet of the worm and condenser back to the still," &c.

III.

The facts clearly did not require the third request should be granted. As previously remarked, the inadequacy of the cistern was of itself an additional violation of law, instead of an excuse. That it was unlawful, to the knowledge of the superintendent, to tap the pipe was evident from his seeking the assessor and telegraphing to the Commissioner for permission, which was not granted. The act then was not only "knowingly and wilfully" done, so far as consciousness and purpose are concerned, but there was the apprehension of its illegal character. It is not worth while to argue whether or not, to save money, one may violate the revenue laws.

EDWIN B. SMITH,
Assistant Attorney-General.